United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-1027

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P/S

To be argued by
ROY M. COHN

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

MILTON PARNESS and BARBARA PARNESS,

Appellants.

On Appeal from Judgment of the United States District Court for the Southern District of New York

BRIEF FOR APPELLANTS

ROY M. COHN
Attorney for Appellants
39 East 68th Street
New York, New York 10021
(212) 472-1400

EUGENE GRESSMAN
MICHAEL ROSEN
Of Counsel

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ISSUES PRESENTED

1. Whether Count One of the indictment, in alleging that through a pattern of racketeering activity an interest was acquired in a foreign enterprise organized and operated in the Netherlands Antilles, stated an offense within the meaning of 18 U.S.C. Section 1962(b), a part of the Organized Crime Control Act of 1970.

2. Whether 18 U.S.C. Section 1962(b) is vague and uncertain within the meaning of the Due Process Clause of the Fifth Amendment in its references to (a) the commission of "indictable" racketeering acts under 18 U.S.C. Section 2314, and (b) the commission of a "pattern" of "at least two acts of racketeering activity" under 18 U.S.C. Section 2314 pursuant to a single scheme to defraud.

3. Whether the conviction of the appellants under the various counts of the indictment violated their rights under the Due Process Clause of the Fifth Amendment where: (a) there was a total absence of proof of the critical charge of stealing or converting money; (b) the prosecutor, over objection, was allowed to advance in his summation a new theory of the offense; and, (c) the trial court, in its charge to the jury, approved that last-minute shift in the Government's theory of the offense and permitted the jury to convict the appellants on a theory never charged by the grand jury in the indictment.

4. Whether a co-defendant can properly be convicted on charges of having aided and abetted in the execution of a scheme to defraud in violation of 18 U.S.C. Section 2314 where: (a) there was a complete absence of proof that such a scheme existed; and, (b) there was a complete absence of proof that the co-defendant, if such a scheme be assumed to have existed, had any knowledge of or knowing participation in the scheme.

5. Whether the appellants' right to a fair trial was prejudiced by the prosecutor's improper reference to their failure to take the stand and by the injection of the prosecutor's personal belief as to appellants' guilt.

6. Whether the trial court improperly denied appellants' motion for a new trial, based upon newly discovered evidence that would rebut and disprove the Government's new theory of the crime, a theory that had first been injected into the trial during the Government's summation and during the charge to the jury.

THE STATUTE

Chapter 96 — Racketeer Influenced and Corrupt Organizations

"Section 1961. Definitions

As used in this chapter —

(1) 'racketeering activity' means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473, (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), *sections 2314 and 2315 (relating to interstate transportation of stolen property)*, sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the

sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

* * *

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "Pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under the State or Federal law, where the usurious rate is at least twice the enforceable rate . . . ."

Section 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through

collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt. . . .

Section 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of

section 1962.

(b) In any action brought by the Untied States under this section, the district courts of the United States, shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof . . . ."

PRELIMINARY STATEMENT

This is an appeal from judgments of conviction (728a-729a) [1] entered in the United States District Court, Southern District of New York, after a 13-day jury trial

1. References followed by "a" are to Appellants' Appendix, other references are to the trial transcript unless otherwise described; "GX" refers to a Government exhibit.

before the Honorable Dudley B. Bonsal, and from the trial Court's order denying appellants' motions for a new trial, judgment of acquittal and arrest of judgment (p. 14, Minutes of December 7, 1973; 6a).

Appellant Milton Parness ("Parness"), 55 years of age, was convicted of Counts One, Four, Five and Six of the indictment and was sentenced to ten years imprisonment on each of said counts (concurrent) and a committed fine totalling $55,000 (728a). [2]

Appellant Barbara Landew Parness ("Barbara"), Milton's wife, was convicted of Counts Four, Five and Six, given a suspended sentence, fined a total of $6,000 and placed on probation for three years (729a). Barbara was not named in Count One (39a).

We believe, as of the writing of this brief, that this appeal raises for the first time, on an appellate level, questions of the constitutionality and construction of Title 18 U.S.C. Section 1961, *et seq.* We further believe that Parness is the first person to ever have been convicted of a violation of this unusual statute.

The central factual issue in this extraordinary prosecution is whether Parness stole, converted or took by fraud, $160,000 from St. Maarten Isle Hotel Corporation, N.V. ("Hotel Corp."), which was then used by Parness to acquire Allan Goberman's ("Goberman") 90.5% stock interest in Hotel Corp., a Netherlands-Antilles corporation which owned a hotel and gambling casino on the Caribbean island of St. Maarten. Casino gambling is legal in St. Maarten.

Parness was indicted and convicted of acquiring Goberman's interest in Hotel Corp. through a "pattern of

2. The unfortunate fact that this Court never modifies sentences directly, and only rarely does so indirectly, *McGee v. United States*, 462 F.2d 243 (2d Cir. 1972) does not encourage us to hope for affirmative relief on the unique severity of a 10 year sentence in the setting of this case.

racketeering activity" (Count One) (8a-13a), and causing the interstate transportation of stolen money and the interstate transportation of Goberman (Counts Four, Five and Six) (15a-17a). The three "substantive" counts on which the basic Count One is grounded involve, however, acts that are part of the very same transaction. Barbara was indicted and convicted of aiding and abetting Parness under Counts Four, Five and Six (15a-17a).

THE INDICTMENT (8a) [3]

Count One charges Parness with acquiring Hotel Corp. through a "pattern of racketeering activity" — a violation of Title 18, U.S.C. Sections 1961, 1962(b) and 1963.

The underlying "acts of racketeering" charged included:

1. On February 4, 1971, Parness, pursuant to a scheme to defraud, "knowingly caused and induced Allan Goberman to travel in interstate commerce, from New York, New York to West Orange, New Jersey and back in execution of said scheme" (11a) — an alleged "indictable act" under Title 18, U.S.C. Section 2314.

2. On February 4, 1971, Parness unlawfully caused the transportation, from New Jersey to New York of two cashier's checks, dated said date, in the amounts of $150,000 and $5,000 "the funds for the purchase of which cashier's checks included funds that had been stolen, converted and taken by fraud from Hotel Corp." (11a) — an alleged "indictable act" under Title 18, U.S.C. Section 2314.

3. On February 9, 1971, Parness unlawfully caused the transportation of a $5,000 cashier's check, dated said date, from New Jersey to New York, "the funds for the

3. This was a superseding indictment.

purchase of said cashier's check having been stolen, converted and taken by fraud from Hotel Corp" (11a) — an alleged "indictable act" under Title 18 U.S.C. Section 2314.

Count One states that from November 1967 until approximately April 3, 1971, Goberman was the owner of 226,250 shares of the outstanding stock of Hotel Corp. Parness was an owner of Olympic Sports Club, Inc. ("Olympic") — which organized gambling junkets to the casino.

Paragraph 3 of Count One — without branding them as criminal acts — sets forth the following events as included within the "pattern of racketeering activity": Beginning approximately April 1, 1970, Parness supervised gambling junkets to the casino and, as part of this activity, collected monies represented by "markers." Markers are executed I.O.U.'s representing amounts of money that players owe due to their losses at the casino. Beginning approximately September 1, 1970, Parness deposited the monies allegedly collected, "at least in part," into Olympic's bank account at the National Newark and Essex Bank ("Newark Bank") in West Orange, New Jersey (9a).

On October 6, 1970, Goberman, personally, borrowed $150,000 from Leonard Holzer ("Holzer") and secured the loan by a pledge of his 226,250 shares in Hotel Corp. By January 25, 1971, the loan was past due and the pledge of the stock was subject to forfeiture by Holzer (10a).

Beginning December 1, 1970, the indictment charges, Parness devised and executed a scheme to defraud Goberman of his stock interest in Hotel Corp. "by means of false pretenses, representations and promises." As part of the scheme Parness collected "hundreds of thousands of dollars" in markers belonging to Hotel Corp. and deposited some of those collections in Olympic's account at Newark Bank and "withheld knowledge of said collections from Goberman" (10a).

As a further part of the scheme, between February 1, 1971, and February 9, 1971, Parness, using two nominees, Barbara, his wife and his cousin, Stanley Amsterdam ("Amsterdam") (803) loaned Goberman $160,000 to repay the Holzer loan (with interest and legal expenses) (10a).

The theory of the indictment is that the entire $160,000 (47a, 47a-1) came "from funds which in reality belonged to Hotel Corp. itself," (10a) — i.e., monies which Parness supposedly stole or converted upon his collection of the markers. The loan was made in the form of the three cashier's checks described above [4] and Parness "did not inform Goberman of the source of the funds." In addition, the indictment charges, as a condition of said loan, Goberman was required to transfer the pledge of his stock (from Holzer) to Barbara and Amsterdam (10a).

Counts Four, Five and Six named both Milton and Barbara Parness and set forth substantive violations of Title 18, U.S.C. Section 2314, which are identical to the three "acts of racketeering," i.e., the February 4 and February 9, 1971 interstate transportation of checks and the February 4 interstate transportation of Goberman (16a-17a).

Counts Two, Three and Seven of the indictment were dismissed by the Court (5a). [5]

STATEMENT OF FACTS

(a) Background

Goberman is a 67-year-old self-proclaimed successful home builder who, by 1967, had, according to him, amassed a net worth of 2½ to 3 million dollars (50a).

4. $150,000 and $5,000 on February 4, and $5,000 on February 9, 1971.

5. In addition, the jury specifically advised the Court that it found no threats or coercion by appellants (1778-1779).

In 1967, he heard of a hotel on the island of St. Maarten in the Netherlands-Antilles. At that time, the hotel was partially built and Goberman became interested in completing the construction.

Goberman's first move was to visit the Netherlands-Antilles Government "to try to straighten out the financial end of it and the financing of the proposed building" (51a). At that time the hotel was owned by the Antilles Government which originally held the mortgage given the builders who went into bankruptcy.

Goberman then formed "Goberman Construction Company, N.V", to be the prime contractor, and Hotel Corp. (53a).

The hotel opened January 10, 1970 and among other things, consisted of 150 guest rooms and a gambling casino (57a). Goberman testified that the hotel made a "nice profit" the first three months of operation (77a). Thereafter, trade fell off and Goberman decided to "push" junkets (78a).[6]

In June 1970, Goberman was indicted in Federal Court in Pennsylvania for submitting a false financial statement to a federal savings and loan association to secure financing (78a).[7] At this point, Goberman was attempting to negotiate a permanent mortgage of 5 million dollars which "would have put me in a position to repay all the loans that I made personally. It would allow me to pay all the

6. Junkets are expense-paid trips to gambling casinos. A player's transportation, room and board are paid by the casino. If a player takes his wife, he pays only for her air fare. A player usually "puts up front money" before he boards the airplane for which he is given credit at the casino against any losses. If he wins, the front money is returned to him. If he loses, the front money is a credit and the player usually signs "markers" (I.O.U.'s) for the balance, or pays the balance at the casino.

7. He was later convicted, as he was for filing false tax returns. He was previously convicted of perjury (214a).

mortgages, the first and second mortgage that were on the property and possibly given me an additional $700,000 in working capital and put me in very good shape . . ." (79a).

Prior to June 1970, (86a) Goberman had met Holzer who was represented as an international banker interested in investing in the Caribbean. Holzer was to arrange a $3,800,000 mortgage for Goberman (88a). On October 6, 1970, Holzer loaned Goberman, personally, $150,000 as a "short term loan, to show his interest and sincerity in doing business with me" (89a). Goberman signed a 30-day demand note to Holzer and "put up my 226,500 shares of stock, which I owned, in the hotel corporation for the security" (92a). Holzer, later, decided not to go ahead with the mortgage (89a).

Goberman testified (94a) that Holzer's $150,000 "went into the general operation, I believe of the hotel at that time." Goberman stated that he deposited Holzer's check for $150,000 into his (Goberman's) personal account at the Bank of Nova Scotia in St. Maarten and subsequently, "the money was withdrawn from that account and I loaned it to the Hotel Corporation" (94a) by making and authorizing deposits "into the general account of the same Hotel Corporation" (95a).[8] As will be demonstrated later, this is a falsehood, which became provably such after the trial, and constitutes *inter alia*, the new trial motion. (Point VI, *infra*)

(b) Parness Enters the Picture

Goberman met Parness in late summer or early fall of 1970 (68a). Goberman offered Parness the exclusive operation of the junkets to the casino (70a).

By letter dated November 20, 1970, Holzer demanded that Goberman pay the $150,000 note (GX24, 99a). On

8. This testimony forms the basis of the Government's pivotal contention that Goberman was a creditor of Hotel Corp. to the extent of the $150,000 which Holzer loaned him and which, in turn, he "loaned" to Hotel Corp.

December 8, 1970, Goberman replied to Holzer requesting an extension of time for the repayment (GX25). Holzer extended the repayment date.

Goberman did not repay the loan. In January 1971, Holzer placed an advertisement in the New York Times offering Goberman's shares for sale to the highest bidder (103a-104a). The sale was scheduled for February 5, 1971. Holzer also commenced an action on Goberman's note by way of a motion for summary judgment in the Supreme Court, New York County (442a).

Holzer was represented by Willkie, Farr & Gallagher ("Willkie"), who assigned Larry Faigen ("Faigen"), an associate of the firm, to the case. Faigen was familiar with the situation, having prepared for Holzer the papers for the $150,000 loan to Goberman.

William Hamilton ("Hamilton"), an attorney who represented Goberman in the past, was asked by Goberman and Parness to defend and delay Holzer's New York County action against Goberman (712). Hamilton and Faigen met on the return date of Holzer's motion for summary judgment and agreed to a short adjournment to permit the note to be paid.

On February 4, 1971, Barbara went to Newark Bank and deposited $155,000 consisting of a $56,000 check from Olympic and $99,000 in cash. Later that day Goberman and Hamilton went to Faigen's office at Willkie (139a) and then all three men travelled to Newark Bank (140a).

At the Newark Bank, either Hamilton or Faigen were handed two cashier's checks — one for $150,000, one for $5,000. The three men then returned to New York (139a-142a).[9] The $155,000 was used to pay off

9. The February 4 trip to New Jersey is one of the "acts of racketeering" alleged in the indictment i.e., that pursuant to a scheme to defraud Goberman, Parness caused Goberman to travel in interstate commerce in execution of said scheme. The simultaneous interstate transportation of the two checks totalling $155,000 is the second of the "acts of racketeering" alleged in the indictment.

Goberman's debt to Holzer, with interest.

On February 9, 1971, a $5,000 Newark Bank cashier's check, purchased with a $5,000 check from Olympic, was used to satisfy Willkie's claim for legal fees in connection with Holzer's action against Goberman in the Supreme Court.[10]

Hamilton prepared an agreement ("the Agreement"), dated February 5, 1971, between Parness' nominees, Barbara and Amsterdam and Goberman, providing that Goberman would repay, on February 8, 1971, the monies put up to pay off Holzer (GX38). The pledge of Goberman's Hotel Corp. stock was transferred to Barbara and Amsterdam. Parness, at Goberman's request, extended the time for Goberman to pay and redeem his stock from February 8 to March 15, 1971 (242a). By March 15, 1971, Goberman had not paid the monies pursuant to the Agreement.

Towards the end of March, 1971, Faigen asked to meet Parness, since he was interested in travelling with Mrs. Faigen and Willkie associate, Jeffrey Stone ("Stone") to St. Maarten for a brief vacation (1092-1093). They met in a restaurant in Manhattan. Parness told Faigen that he had made the loan to Goberman but that Goberman had not repaid it and he wanted to protect himself and take over the stock. Parness asked Faigen to represent him. Faigen told Parness that it was a simple Uniform Commercial Code matter and that he could see no problem (1094).

In the first days of April 1971, Faigen, his wife and Stone went to St. Maarten and stayed at the hotel. When they arrived, Parness and Goberman were at the hotel. Several hours later, Mrs. Goberman and Howard Rubin ("Rubin"), Goberman's Pennsylvania attorney arrived (44a; 1095).

10. Thus the passage of this check from Newark Bank to Willkie in New York constitutes the third of the "acts of racketeering" alleged in the indictment.

For the next several days, various discussions took place between the parties. The end result was the creation of seven letters (GXS. 77 through 83) and the transfer of Goberman's stock to Barbara and Amsterdam. Several letters were postdated (1106-1107). The letters were first written out in longhand by Faigen and Stone (1103, 1280) and dated by Stone. Stone described the documents as "notice letters" — intending to conform to the dates of the Agreement and Goberman's default (1112, 1283). Faigen reviewed each of the documents with Parness, Goberman and Rubin (1102). Goberman remained on the Hotel Corp. payroll thereafter, and on July 2, 1971, was replaced as managing director of Hotel Corp. by Edward Levrey, Parness' cousin, an experienced resort operator.

This is how Parness indirectly acquired an interest in Hotel Corp. The indictment charges that this acquisition in the Netherlands-Antillean Hotel Corp. was through a "pattern of racketeering activity" in that Parness committed three "indictable acts", i.e., on February 4 and February 9, 1971, he caused the interstate transportation of $160,000 of stolen funds and on February 4, he caused the interstate transportation of the victim of a crime, i.e., Goberman.

(c) The Proof Relating to the Markers

The core factual issue in the case was whether Parness stole or converted $160,000 in marker collections which was loaned to Goberman to pay off Holzer. The prosecution was required to prove that this money was stolen between December 1, 1970 (when the indictment charges Parness devised the scheme) and February 9, 1971 (when the final $5,000 crossed the New York/New Jersey line).

Goberman testified that at the time of the Holzer foreclosure, he thought there was $350,000 — $400,000 to

be collected by Parness on markers (489a-492a).[11]

Goberman was pressed by defense counsel and the court to provide affirmative proof of the Government's basic allegation that Parness stole or converted marker collections. Goberman could only venture a guess, based on records he didn't have and concededly on the assumption that the accounts receivable were collected — as to which there was not a word of proof (489a-512a). To the contrary, proof including presence in court of actual markers proved that they were not collected.

The Government's failure to prove that any money was stolen or converted is highlighted by the following exchange:

> "Q. If I may ask this question on this whole general subject, *as you are on this witness stand now*, you cannot give us an itemization of what uncollected markers you included and what you did not include in the $400,000 figure, is that so?
> A. [GOBERMAN]: I just took the flat, in my mind, 10 per cent, and I don't believe that I included Mr. —
>
> THE COURT: That isn't quite clear, or the answer to the question.
>
> *I think the question is whether you, on the basis of these records, sitting here in that witness chair, you can reconstruct the $400,000.*
>
> THE WITNESS: *I can't reconstruct it without some assistance. There are some more papers some place.*

11. Goberman, as plaintiff — individually — on February 5, 1974, filed a civil suit against appellants claiming that appellants collected and "failed to deliver" $650,000 to Goberman. The civil suit does not allege that the collections were owed to Hotel Corp. as does the indictment.

THE COURT: *You couldn't do it as you sit here now, without those records?*

THE WITNESS: *No*" (512a). (Emphasis supplied.)

Goberman, nor any other witness, could supply one iota of substantiation that Parness, or anyone else, ever stole one cent from Hotel Corp. or Goberman.

The above is the totality of the testimony in the record concerning the alleged $350,000 — $400,000 that Parness stole or converted.

John Blandino ("Blandino"), Hotel Corp.'s former executive assistant manager, casino comptroller and managing director, testified that when a marker is paid by a player, it is returned to him (984). Blandino identified $155,000 in *original markers*, which the prosecution subpoenaed (Defendants' Exhibits Q-Y for identification, 985 *et seq.).* Notwithstanding, Blandino's identification; the Court's comment about the "weight to be given to the document" (989); defense counsel's protestation that the markers were the most important point in the case (998); the Court's recognition that $64,000 of Mike Selik's and Sam Norber's markers were never collected by Parness (998, 1013) and the prosecution's concession that some players paid and some did not and that it has no knowledge whether the markers were collected or not — (1012, 1014), the Court refused defense counsel's offer to receive the markers in evidence (998).

Blandino testified further that Parness transmitted hundreds of thousands of dollars from New York to the hotel during January — March 1971 (1041).

The books of Olympic (GX155) show the transmittal of hundreds of thousands of dollars to the hotel, more money than Parness had collected.

The prosecutor in summation conceded that Parness transmitted "hundreds of thousands of dollars" to the hotel (1648-1649).

ARGUMENT

POINT I

COUNT ONE OF THE INDICTMENT FAILED TO STATE AN OFFENSE WITHIN THE MEANING OF 18 U.S.C. SECTION 1962 (b).

At the outset of this appeal a critical defect in the indictment must be brought to this Court's attention.

In enacting the Organized Crime Control Act of 1970, Congress expressed no intention to protect foreign enterprises, organized and operated outside the United States, from the deleterious impact of racketeering investment and control. Its concern in this regard was solely with enterprises in some way involved with the American economy. Hence, when Count One of the instant indictment alleges that a racketeering-type control was acquired and maintained as to an enterprise organized and operated in the Netherlands-Antilles, no crime within the scope of the Act has been charged.

In short, Count One of the indictment fails on its face to state an offense under 18 U.S.C. Section 1962(b), and the conviction thereunder of the appellant Parness cannot be sustained. And while this defect was not brought to the attention of the District Court below, it can properly be raised in this Court for the first time, it being a defect that can and must be noticed at any time.[12]

12. See Rule 12(b)(2) of the Federal Rules of Criminal Procedure; *Carlson v. United States*, 296 F.2d 909, 910 (9th Cir. 1961); *United States v. Manuszak*, 234 F.2d 421, 422 (3rd Cir. 1956); Wright, Federal Practice and Procedure, Vol. 1, Section 193, pp. 403-404 (1969).

A. The Statutory Problem

Congress has stated in Section 1962(b) that:

> "It shall be unlawful for any person through a pattern of racketeering activity... to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

In charging an offense under that statutory language, Count One of the indictment alleged that through a pattern of racketeering activity the appellant Milton Parness acquired and maintained a 90.5 percent equity interest in the St. Maarten Isle Hotel Corporation, N.V., which was described in paragraph 1 (a) of Count One as:

> "...a corporation established pursuant to the laws of the Netherlands-Antilles, was engaged in the business of operating a resort hotel and gambling casino, and constituted an 'enterprise' as defined by Title 18, United States Code, Section 1961(4), which enterprise was engaged in, and the activities of which affected, interstate and foreign commerce."

The St. Maarten Isle Hotel Corporation, as the jury was instructed (598a), operated its hotel and gambling casino on the island of St. Maarten in the Netherlands-Antilles.

Two vital elements are evident from Count One's designation of the enterprise in which the allegedly illegal investment was made: (1) the enterprise was organized and operated in a foreign land, the Netherlands-Antilles; and (2) that foreign location constituted one terminus of the foreign commerce referred to in Count One. In elaboration

of the latter element, the jury was charged that "foreign commerce" for purposes of Count One meant "movement of people, money or goods to or from the United States, as between New York and St. Maarten"(604a). The jury was further advised by the Court that "foreign commerce within the meaning of the statute [Section 1962(b)]" meant "the gambling junkets [that] went from the United States to St. Maarten"(623a). Indeed, the Court instructed the jury that "there is no question that this hotel [in St. Maarten] was an enterprise and I think that it affected foreign commerce"(606a).

The critical question that here emerges is whether Congress did in fact or by express intention extend the geographical reach of Section 1962(b) so as to proscribe the investment of racketeering income in totally foreign enterprises of the type described in Count One of this indictment. Or are the proscribed investments limited to those involving domestic or American enterprises that in some manner affect or are engaged in "interstate or foreign commerce"? If the answer to that formulation of the question is in the affirmative, Count One's allegation that racketeering investment was made in a foreign enterprise in the Netherlands-Antilles fails to assert a crime within the scope of Section 1962(b).

The problem is essentially one of statutory interpretation, as to which various considerations and principles of construction become relevant. And when those considerations and principles are brought to bear on Section 1962(b), the conclusions are inescapable that Section 1962(b) does not cover racketeering investments in alien enterprises, however much they may affect foreign commerce with the United States, and that Count One thus fails to allege any racketeering investment outlawed by Section 1962(b).

B. The Statutory Considerations

(1) Section 1962(b) must be read as an integral part of Title IX (now designated as Chapter 96 of Title 18, U.S.C.) of the Organized Crime Control Act of 1970, 18 U.S.C. Sections 1961-1968. This Title IX is labeled "RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS" and Section 1962(b) is simply one of the sanctions designed by Congress to protect organizations or enterprises from the influence and the corruption that racketeers might bring through their investments in such organizations or enterprises.[13] The important point is that the target or the purpose of the Title IX provisions is to protect organizations or enterprises from such corrupting influences. And thus the kind and location of the organizations and enterprises to be protected become the starting point of the statutory problem here involved.

(2) In Title IX of the Act, Congress has not attempted to define the enterprises to be protected except in the most general language of Section 1961(4) — i.e., the term "enterprise" is there defined to include:

> "... any individual, partnership, corporation, association, or other legal entity, and any union or

13. In H. Rep. No. 91-1549, which explains the various provisions of the Organized Crime Control Act of 1970, Section 1962(b) is described and contrasted with Section 1962(a) in the following terms (2 U.S. Code Cong. & Admin. News, 1970, p. 4033):

> "Subsection (b) prohibits acquisition or maintenance of an enterprise through the proscribed pattern of racketeering activity or collection of unlawful debt. There is no 1 percent limitation here as in subsection (a) because (a) focuses on legitimate acquisition with illegitimate funds. Subsection (b) focuses on illegitimate acquisition with illegitimate funds. Subsection (b) focuses on illegitimate acquisition through the proscribed pattern of activity or collection of debt. Consequently, any acquisition meeting the test of subsection (b) is prohibited without exception.

> group of individuals associated in fact although not a legal entity."

No reference is made in that definition to the geographical location of the "enterprise" or the state or nation under whose laws the "enterprise" has been organized. But what is significant in this generalized definition, at least for purposes of the statutory problem at hand, is the absence of any language affirmatively indicating that the enterprises within the umbrella of Title IX include those organized and operating in foreign lands.

(3) The general purposes of Congress in enacting the Organized Crime Control Act of 1970 have been stated in Section 1 of Public Law 91-452 (set forth as a Note to 18 U.S.C.A. Section 1961):

> "The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of

> defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.
>
> It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."

It will be noted from the foregoing statement of Congress that the legislators intended by the Act to eradicate the evils of "Organized crime in the United States," including the use of the ill-gotten gains of organized crime "to infiltrate and corrupt legitimate businesses and labor unions and to subvert and corrupt our democratic processes." Such activities "in the United States" were said to "weaken the stability of *the Nation's economic system*, harm innocent investors and competing organizations, interfere with free competition, seriously burden *interstate and foreign commerce*, threaten the *domestic security*, and undermine the general welfare of *the Nation and its citizens.*" (Emphasis added.) Here, then, is an official expression of congressional concern with the business activities and investments of "organized crime in the United States." It is a concern expressed exclusively in terms of the impact of such activities and investments on the domestic or American economy. And only those enterprises organized or operating within the domestic economy, by way of either interstate or foreign commerce, can be said to have, through racketeering investments, the

deleterious impact on that economy that is the subject of congressional concern.

There is, in other words, not the slightest indication in Section 1 of Public Law 91-452 that Congress was concerned with the economies of such foreign lands as the Netherlands Antilles or with the American Racketeering infiltration and corruption of business enterprises in those foreign lands. So far as this Act is concerned, Congress left to the Netherlands-Antilles its sovereign power to protect the Netherlands–Antilles economic system and this particular enterprise from corrupt American influences. Indeed, the evidence at this trial shows that the Netherlands–Antilles government imposed on the St. Maarten hotel-casino stringent licensing and other operational requirements.[14]

(4) The legislative debates that accompanied the passage of the Organized Crime Control Act of 1970 fully confirm the parochial scope of the congressional intention. Time and again the Senators and Representatives expressed their concern with the racketeering infiltration of "our" legitimate business organizations, or those enterprises engaged "in interstate commerce" — by which they obviously meant American based and operated organizations. [15] To give typical examples:

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14. See, for example, Goberman's testimony (56a-58a) as to the interest of the Netherlands-Antilles government in the licensing of the casino and in the financing of the construction of the enterprise.

15. Note that H.Rep. No. 91-1549 (2 U.S. Code Cong. & Admin. News, 1970, p. 4010) refers to Title IX provisions only in terms of "any enterprise engaged in interstate commerce," though the Title IX provisions themselves speak of " any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

Obviously, the legislators were here speaking and writing of American business enterprises in their commonest form — i.e., those engaged in or affecting interstate commerce. A smaller number of American enterprises, of course, engage in or affect foreign commerce as well.

"Senator McClellan, the chief sponsor of the Act, stated that 'with its extensive infiltration of legitimate business, organized crime thus poses *a new threat to the American economic system.* The proper functioning of a free economy requires that economic decisions be made by persons free to exercise their own judgment.' 115 Cong. Rec., Part 5, p. 5874 (March 11, 1969). [Emphasis added.]

Senator McClellan, during the Senate debates, further said that Title IX, which includes Section 1962, 'is aimed at removing organized crime from *our legitimate organizations* . . . . Title IX attacks the problem by providing a means of wholesale removal of organized crime from *our organizations* . . . [citing statistics to show] the extent of infiltration of *our legitimate organizations* by the mob.' 116 Cong. Rec., Part 1, pp. 591-592 (Jan. 21, 1970). [Emphasis added.]

Referring to American enterprises not as 'our organizations' but as businesses 'engaged in interstate commerce,' Senator Hruska remarked that Title IX 'makes it unlawful to use income obtained from certain designated racketeering enterprises to acquire an interest in *a business engaged in interstate commerce*, to use racketeering activities as a means of acquiring such a business, or to operate such a business by racketeering methods.' 116 Cong. Rec., Part 27, p. 36294 (Oct. 12, 1970). [Emphasis added.]

Senator Dole likewise argued that Title IX, broadly speaking, 'would create strict criminal penalties for using the proceeds of racketeering activity to acquire an interest in *businesses engaged in interstate commerce*, or to acquire or operate such businesses by racketeering methods.' 116 Cong. Rec., Part 27, p. 36296 (Oct. 12, 1970). [Emphasis added.]

> One of the principal House sponsors, Rep. Poff, pointed out that Title IX deals 'with the economic base through which those individuals constitute such a serious *threat to the economic well-being of the Nation.*' 116 Cong. Rec., Part 26 p. 35193 (Oct. 6, 1970).[Emphasis added.]
>
> Rep. Poff further urged the approval of Title IX since 'perhaps the single most alarming aspect of the organized crime problem in the United States in recent years has been the growing infestation of racketeers into legitimate business enterprises. This evil corruption of *our commerce and trade* must be stopped.' 116 Cong. Rec., Part 26, p. 35295 (Oct. 7, 1970). [Emphasis added.]
>
> Rep. Cellar pointed out that 'Title IX is designed to inhibit the infiltration of legitimate business by organized crime . . . [and] prohibits the investment of funds derived from a pattern of racketeering activity or from the collection of an unlawful debt, where the investor participated as a principal, *in a business engaged in interstate commerce.*' 116 Cong. Rec., Part 26, p. 35196 (Oct. 6, 1970). [Emphasis added.]
>
> Rep. Randall argued: "Legitimate business is invaded by crime forces in order to acquire facades of respectability. This *national disgrace* must be stopped. The bill before the House will stop it.' 116 Cong. Rec., Part 26, p. 35327 (Oct. 7, 1970). [Emphasis added.]"

In sum, the Congress exhibited concern solely as to the adverse impact on the American economy of racketeer-infiltrated enterprises. From the legislative history, it is fair to say that (1) no thought or consideration was given to the impact of American racketeering investments in alien enterprises organized and operating in foreign lands, and (2) not one syllable was

uttered indicative of any affirmative legislative intent to apply the Title IX provisions to alien enterprises in foreign lands who chanced to engage in "foreign commerce" with the United States.

(5) Consistent with the foregoing legislative intent, other Title IX provisions are so constructed that certain of them can effectively be applied only where racketeering investments have been made in domestic or American-based enterprises. Thus, as constituent parts of Title IX, (a) Section 1963 authorized the forfeiture to the United States of any interest or property right in an enterprise acquired or maintained in violation of Section 1962; (b) Section 1964(a) gives jurisdiction to federal courts to prevent and restrain violations of Section 1962 and to issue orders dissolving or reorganizing "any enterprise," the activities of which affect interstate or foreign commerce; and (c) Section 1968 authorizes the Attorney General to demand that "any person or enterprise" produce documents or records that may be pertinent to any racketeering investigation, a demand which may be judicially enforced. None of such provisions, of course, could be applied to an alien enterprise outside the United States, whether it be in the Netherlands Antilles or the lower regions of Siberia. They are provisions borrowed from the federal antitrust laws, provisions directed toward enterprises that are somehow "present" within the United States.

(6) Finally, to construe Section 1962(b) to apply only to investments in enterprises associated with the American economy, as Congress has indicated, is not to detract from or do violence to any of the language in that section. In critical part, Section 1962(b) outlaws any racketeering investments in "any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." The full force of that language may be spent upon enterprises somehow associated with the American economy, through organization, operation, the doing of business or the presence of an agent, and whose activities involve or affect "interstate or foreign commerce."

In other words, to construe Section 1962(b) as not extending to investments in alien enterprises in foreign lands that engage in "foreign commerce" with the United States is simply to recognize that foreign commerce, unlike interstate commerce, involves one terminus outside the sovereign jurisdiction of the United States. If Congress were to extend Section 1962(b) or any other regulatory statute to protect the enterprise located at that foreign terminus, an enterprise having no connection with the United States other than engaging in or affecting commerce with the United States, serious constitutional questions might arise. Does the constitutional power of Congress to regulate foreign commerce authorize it to regulate or eradicate unsavory investments in every enterprise or corporation in the world that has commercial transactions with someone in the United States? Can Congress become the watchdog for every foreign or alien enterprise? Can the United States thus replace the sovereign power of the Netherlands-Antilles to regulate, eradicate and outlaw certain types of investment in enterprises organized and operated in the Netherlands-Antilles?

Fortunately, those questions need not here be answered. Through a series of decisions, the Supreme Court has mandated a principle of statutory construction that avoids such a constitutional confrontation.

C. The Controlling Rule of Construction

On February 19, 1974, the Supreme Court rendered its decision in *Windward Shipping (London), Ltd. v. American Radio Assn.*, No. 72-1061, 42 Law Week 4234. In that decision the Court reaffirmed once again a rule of statutory construction that is both applicable to and dispositive of the instant problem of interpreting Section 1962(b).

The *Windward* decision is but the latest in a series of Supreme Court cases stretching over the past 17 years in which the Court has considered the applicability of the

Labor Management Relations Act to labor disputes involving foreign flag vessels operating in international maritime commerce.[16] That Act, like the Organized Crime Control Act, is jurisdictionally grounded upon the enterprise or the employer being involved in interstate or foreign commerce.[17] And the problem facing the Court in those cases was whether Congress, by such broad references to commerce meant to apply the Act to foreign-owned ships, staffed by foreign nationals, that chanced to be present in American waters when labor disputes arose.

In the seminal case is this series, *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138 (1957), the Supreme Court held that, while the presence of such a ship in American waters would give Congress constitutional authority to deal with a labor dispute arising thereon, Congress had in fact shown no intent to bring such a dispute within the coverage of the Labor Management Relations Act. It was not enough that the Act contained a broad definition of commerce. Unless Congress had somehow shown an affirmative desire to extend the Act to foreign-owned ships, as the Court later said in *Incres Steamship Co. v. International Maritime Workers Union*, 372 U.S. 24, 27 (1963), "we have concluded that the maritime operations of foreign-flag ships employing alien seamen are not in "commerce" within the meaning of section 2(6), 29 U.S.C. Section 152(6)." See also *McCulloch v. Sociedad Nacional*, 372 U.S. 10, 19-20 (1963).

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16. *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138 (1957); *McCulloch v. Sociedad Nacional*, 372 U.S. 10 (1963); *Incres Steamship Co. v. International Marine Workers Union*, 372 U.S. 24 (1963); *International Longshoremen's Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195 (1970).

17. The Labor Management Relations Act is applicable to employers operating "in commerce," which is defined in 29 U.S.C. Section 152(6) to mean trade "among the several States . . .or between any foreign country and any State, Territory, or the District of Columbia."

The decisions from *Benz* through *Windward* have articulated the considerations relevant to determining whether and when Congress has extended a statute, that does no more than speak broadly of interstate and foreign commerce, to a foreign or alien enterprise. The essential components of this test or search may be stated thusly:

(1) Whenever an effort is made to apply a Congressional statute so as to affect the affairs of a foreign or alien enterprise and thus to occupy an area subject to foreign sovereignty, "for us to sanction the exercise of local [American] sovereignty under such conditions in this 'delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed.' 353 U.S. at 147." *McCulloch v. Sociedad Nacional, supra*, at 21-22. Thus Congress alone must be the judge of whether the possibilities of international discord are so minimal and retaliative action so unlikely that the statutory protections and proscriptions may safely be applied to a foreign enterprise. It is that kind of a judgment by Congress that must be clearly expressed. A court cannot, in its decisional process, substitute its judicial judgment on such a matter.[18]

(2) In such an international context, Congress must not only "clearly express" its intention to extend its powers extraterritorially but it must also make some sort of " 'sweeping provision' as to foreign applicability." *Benz v. Compania Naviera Hidalgo, supra*, at 146. And it is for that reason that statutory language applying an act to enterprises engaged in interstate and foreign commerce must be considered inadequate as indicative of such a legislative intent. So broad a reference to foreign commerce may well indicate no more than an intent to apply the statute to all domestic or American-based enterprises that engage in or affect foreign commerce.

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18. See also the admonition of Chief Justice Marshall in *The Charming Betsy*, 2 Cranch 64, 118 (1804), that "an act of congress ought never to be construed to violate the law of nations if any other possible construction remains."

(3) To the extent that it is proper, where the face of the statute is silent, to search in the legislative history for the Congressional intent necessary to apply a particular statute extraterritorially, that search is here counter-productive. The legislative history of Title IX of the Organized Crime Control Act, as we have seen, is barren of any indication of a Congressional concern for foreign enterprises or a Congressional intent to extend the protections of that Title IX to foreign enterprises. On the contrary, that history shows an affirmative desire to apply Title IX solely to domestic or other enterprises that are in some way related to the American economy.

It was precisely that kind of legislative history that controlled the Supreme Court's interpretation of the international scope of the Labor Management Relations Act. From *Benz* to *Windward*, the Court was never able to uncover the slightest indication from the legislative reports and debates that Congress clearly intended any extension of that Act to foreign-owned enterprises. As stated in *Benz*, 353 U.S. at 143-144:

> "Our study of the Act leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws. The whole background of the Act is concerned with industrial strife between American employers and employees. In fact, no discussion in either House of Congress has been called to our attention from the thousands of pages of legislative history that indicates in the least that Congress intended the coverage of the Act to extend to circumstances such as those posed here. It appears not to have even occurred to those sponsoring the bill. The Report made to the House by its Committee on Education and Labor and presented by the coauthor of the bill, Chairman Hartley, stated that 'the bill herewith reported has been formulated as

> a bill of rights both for *American* workingmen and for their employers.' The report declares further that because of the inadequacies of legislation 'the *American* workingman has been deprived of his dignity as an individual,' and that it is the purpose of the bill to correct these inadequacies. . . . H.R. Rep. No. 245, 80th Cong., 1st Sess. 4. What was said inescapably describes the boundaries of the Act as including only the workingmen of our own country and its possessions." [Emphasis in original.]

The lesson to be drawn in the instant case is clear. The Supreme Court's approach to the effort to extend a non-criminal statute like the Labor Management Relations Act to foreign enterprises must surely govern the approach to the effort in this criminal case to extend the racketeering investment provisions of the Organized Crime Control Act, Section 1962(b), to foreign enterprises. And so utilizing that approach, Section 1962(b) must be confined through the process of construction to investments in enterprises, engaged in or affecting interstate or foreign commerce, that in some way function as a part of the American economy.

Indeed, the parallel between the commerce provisions of the Labor Management Relations Act and the Organized Crime Control Act is almost precise; those provisions say no more than that the respective statute shall be applicable to foreign commerce enterprises. And in the *Benz* line of cases, the Supreme Court has consistently found such a broad reference to foreign commerce inadequate as an expression of Congressional desire respecting foreign applicability.

The parallel between the legislative histories of the two Acts is perhaps even more precise. In neither history did Congress address itself to the problem of applying the statute to foreign enterprises. In neither history was there

any affirmative declaration of intent to make the scope of the foreign commerce provisions extraterritorial. And in both legislative histories are repeated statements that the bills were designed to help the American workmen and employers or "our" business enterprises and "our" national economy. Far from illustrating any intent to expand coverage of these statutes to foreign enterprises, these histories justify and command that respect be given to the Congressional intent to confine their operation to American-based operations.

This Court has recently had occasion to repeat and reinforce the Supreme Court's admonition in *United States v. Emmons*, 410 U.S. 396, 411 (1973), that nothing in the language or legislative history of the Hobbs Anti-Racketeering Act (18 U.S.C. Section 1951) "can justify the conclusion that Congress intended to work such an extraordinary change in federal labor law or such an extraordinary incursion into the criminal jurisdiction of the States." *United States v. De Laurentis* (2d Cir., January 21, 1974), involving an attempt to extend federal criminal conspiracy laws to labor disputes. That admonition is equally appropriate here, substituting the Organized Crime Control Act for "federal labor law" and substituting the criminal and civil jurisdiction of the Netherlands-Antilles for "the criminal jurisdiction of the States."

POINT II

SECTION 1962(b) ON ITS FACE IS UNCONSTITUTIONALLY VAGUE IN AT LEAST TWO RESPECTS.

Section 1962(b) qualifies as one of the most confusing additions ever made to Title 18 of the United States Code. And out of that confusion emerges a constitutional conundrum of the first magnitude, a puzzle that finds no authoritative answer in judicial precedents.

The District Court, in denying the pre-trial motion to dismiss Count One of the indictment on constitutional grounds, ruled that "18 U.S.C. Section 1962(b) is not unconstitutional for vagueness" (32a). But the depth and extent of the vagueness that permeates Section 1962(b) are barely suggested by the court's memorandum opinion, (28a-38a), which differs in significant respects from the analysis of Section 1962(b) in the court's subsequent charge to the jury (614a *et seq.*). True appreciation of the vagueness if not overbreath that afflicts Section 1962(b) requires a far more searching analysis of the statutory language than is contained in that memorandum opinion.

A. Section 1962(b) On Its Face

Section 1962(b) is not a simple, self-contained provision. It borrows generously not only from other provisions of the Organized Crime Control Act but from 18 unrelated sections of Title 18 and from an unlimited number of state criminal code provisions. In outline form, as appears from its face, Section 1962(b) may be parsed as follows:

Section 1962(b)	Borrowed statutes
"It shall be unlawful for any person through	
*	
a pattern	
* * * * * * * * * * * * * * *	"'*pattern of racketeering activity*' is defined in Section 1961(5) as requiring 'at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after

Section 1962(b)	Borrowed Statutes
	the commission of a prior act of racketeering activity."
* * * * * * * * * * * * * * *	
*	
of racketeering activity	
*	
* * * * * * * * * * * * * * * *	"'*Racketeering activity*' is defined in Section 1961(1) as meaning (A)'any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year;' (B)'any act which is *indictable* under any of the following provisions of title 18, United States Code:' . . . [18 designated provisions of Title 18 are cited, including 'sections 2314 and 2315 (relating to interstate transportation of stolen property)']".
	*
	*
	*
	"The 'indictable acts' here charged in Count One consisted of three alleged violations of 18 U.S.C. Section 2314, the second paragraph of which provides criminal sanctions as to anyone who '. . . having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of

Section 1962(b)	Borrowed Statutes
	money or property having a value of $5,000 or more."
* * * * * * * * * * * * * * *	
or through collection of an unlawful debt	
* * * * * * * * * * * * * * * * *	"'*unlawful debt*' is defined in Section 1961(6) in terms of a debt incurred or contracted in the course of unlawful gambling activities."
* * * * * * * * * * * * * * *	
to acquire or maintain, directly or indirectly, any interest in or control of any enterprise	
* * * * * * * * * * * * * * * *	"'*enterprise*' is defined in Section 1961(4) to include 'any individual, partnership, corporation, association, or other legal entity . . . .'"
* * * * * * * * * * * * * * *	
which is engaged in, or the activities of which affect, interstate or foreign commerce."	

Recasting Section 1962(b), to include all the statutory cross-references and statutory allegations made in this case, produces the following:

> "It shall be unlawful for any person, through a pattern of committing at least two acts which are indictable under 18 U.S.C. Section 2314 (relating to interstate transportation of stolen property), to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

B. Section 1962(b) in the Indictment

Count One of the indictment (8a-13a), a verbose and rambling allegation, appears to incorporate a version of

Section 1962(b) not too different from what appears on the face of that section. Thus, by reading paragraphs 2, 3, and 4 of Count One (9a-13a), the indictment's version of Section 1962(b) appears to be:

> "It shall be unlawful for any person in violation of Section 1962(b) to acquire and maintain a 90.5 percent equity interest in an enterprise affecting foreign commerce through a pattern of racketeering activity, as defined in Sections 1961(1)(B) and 1961(5) to mean and include at least two indictable acts under 18 U.S.C. Section 2314 — relating to the interstate transportation of stolen money and inducing a victim to travel interstate, all pursuant to a scheme to defraud Goberman of his 90.5 percent equity interest in the enterprise."

C. Section 1962(b) in the Jury Charge

But the District Court below, in charging the jury, created a significantly different version of Section 1962(b) for purposes of assessing the guilt of Parness under Count One of the indictment. In that charge to the jury, five elements were said to constitute an offense under Section 1962(b), each of which had to be proved by the Government beyond a reasonable doubt:

1. The first element, "the crucial one," was said to be the devising of a scheme to defraud (614a).

2. The second element was said to be "whether in carrying out the scheme, Mr. Parness engaged in a pattern of racketeering activity," which was defined to mean the commission of at least two crimes under 18 U.S.C. Section 2314 (616a).

3. The third element of a Section 1962(b) crime was posed in question form: "Did Parness acquire Goberman's

interest in the hotel corporation through this scheme to defraud and through this pattern of racketeering activity?" (622a).

4. The fourth element was said to be whether "the activities of the hotel corporation which I referred to as the enterprise affected foreign commerce" (623a).

5. The fifth and last element was whether "Mr. Parness acted knowingly, wilfully and unlawfully, and that he knowingly devised and carried out the scheme to defraud Goberman" (623a). [19]

All of these five elements were repeated and summarized for the jury's benefit at 624a. It can therefore be said that Section 1962(b), as interpreted and applied in this case by the District Court, came to read as follows:

> "It shall be unlawful for any person, acting pursuant to a scheme to defraud, to engage in a pattern of racketeering activity by committing at least two crimes under 18 U.S.C. Section 2314 so as thereby to acquire an interest in an enterprise affecting foreign commerce, in all of which activities the person acted knowingly, wilfully and unlawfully."

D. The Constitutional Requirements of Certainty

Against this background of reading Section 1962(b) on its face, as set forth in the indictment, and as applied in this instance through the charge to the jury, an assessment must be made of this statute in terms of its conformity with the requirements of certainty imposed by the Due Process Clause of the Fifth Amendment. Those

19. Section 1962(b) does not speak of any knowledge or wilfulness on the part of the defendant. Section 2314, particularly the second paragraph thereof, refers only to the defendant "having devised or intending to devise any scheme or artifice to defraud."

requirements, of course, are contained within the basic constitutional principle that a criminal statute—federal or state — must give fair warning of the conduct that it makes a crime. As was said by the Supreme Court in *United States v. Harriss*, 347 U.S. 612, 617 (1954):

> "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."

See also *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

The Supreme Court has recently underscored the several important values that are offended by an enactment whose criminal prohibitions are not clearly defined. "First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."[20] *Grayned v.*

20. In the *Grayned* opinion, 408 U.S. at 109, the Court also specified a third value, i.e., "where a vague statute 'abut[s] upon sensitive areas of First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' "

That third value, of course, does not surface in the instant case.

City of Rockford, 408 U.S. 104, 108-109 (1972). And see *Papachristou v. City of Jacksonville*, *supra*, at 162; Freund, The Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533, 541 (1951).

To preserve those two major values of giving fair notice to a person of ordinary intelligence and precluding arbitrary and erratic applications of criminal sanctions, the Due Process Clause demands that the language of a criminal statute forbidding or requiring the doing of an act be so precise that defendants, prosecutors and judges need not guess or differ as to its meaning and application. But this constitutional test of precision is one that must be impressed upon a statute as of the time a prospective defendant is confronted with his own decision as to whether his contemplated course of action will or will not violate the statute in question. It is at that point in time, not later at the indictment or trial stage, that the notice to the individual, to be fair, must be given by the statute. In the words of a lower court opinion from the District of Columbia, cited and quoted with approval by the Supreme Court in *Connally v. General Construction Co.*, 269 U.S. at 393:

> "The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, *in advance*, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another." (Emphasis added.)

In other words, the fair and precise notice must be conveyed through the statute to the citizen prior to his embarking on a course of conduct that may bring him into criminal collision with the statute. As stated in the Supreme Court's opinion in *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964), the constitutional requirement

of a fair warning "turns upon the status of . . . [the] law as of a given moment in the past — or, more exactly, the appearance to the individual of the status of . . . [that] law as of that moment" just prior to embarking on the conduct in issue. It is at that moment that the individual, in choosing his course of conduct, is presumed to know the law — but only if that law is certain and not vague. As the *Bouie* case itself demonstrates, it is far too late to give the individual the required precise notice at the subsequent trial on charges made under an otherwise vague or overbroad statute.[21]

Thus neither an indictment nor a charge to the jury, let alone a subsequent judicial opinion, can do service as the precise notice required by the Due Process Clause.

> "If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it . . . .It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression." *Lanzetta v. New Jersey*, 306 U.S. at 453.

With those principles in mind, Section 1962(b) may profitably be examined. And when tested in light of those principles, Section 1962(b) must be deemed to be unconstitutionally vague.

E. The Vagueness on the Face of Section 1962(b)

The precise inquiry in this case thus becomes: What definite notice did the appellant Parness have from a

21. Moreover, if we assume, as the Supreme Court assumed in the *Grayned* case, 408 U.S. at 108, "that man is free to steer between lawful and unlawful conduct," respect for that freedom demands that a fair warning be given so that the individual can exercise his freedom of choice prior to the leveling of criminal charges.

reading of the language of Section 1962(b) that if he embarked upon a scheme to defraud Goberman of his stock interest in the hotel enterprise he would likely incur the harsh criminal penalties inflicted by that statute?[22] The answer to that question is not simple and it is not singular in nature. Section 1962(b) is filled with numerous potholes of possible vagueness, many of them created by other statutes incorporated by reference into Section 1962(b). One by one, therefore, each of these problems of statutory vagueness must be examined.

(1) *What is the "racketeering activity" proscribed by Section 1962(b)?* The ordinary reader will find that "racketeering activity" is defined, for purposes of Section 1962(b), by the lengthy Section 1961(1). And that latter section defines "racketeering activity" primarily as (A) any act or threat involving some eight specified types of crime which is "chargeable under State law and punishable by imprisonment for more than one year," or (B) "any act which is indictable under any of the following [18] provisions of title 18, United States Code," including, of course, 18 U.S.C. Section 2314.[23] Under Section 1961(5), a pattern of such "racketeering activity" is established by the commission of "at least two acts of racketeering activity" occurring within ten years of each other.

Thus the notice that Congress purported to give the appellant prior to his involvement in the alleged Section 1962(b) offense was that if he committed the minimum

22. Appellant accepts this Court's admonition that "he can derive no assistance" by "suggesting hypothetical cases taken from the peripheral areas of the statute's scope . . . . He must show that, as applied to his own case, the statute was so vague and uncertain that he was not presented with an 'ascertainable standard of guilt.' " *United States v. Irwin*, 354 F.2d 192, 196 (2d Cir. 1965).

23. Section 1961(1) also has two other categories of "racketeering activity": (C) any act which is "indictable" under Title 29 of the United States Code; and (D) "any offense involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, . . .buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States."

number of two "indictable" acts under 18 U.S.C. Section 2314 he might be held criminally responsible under Section 1962(b) if he invested the proceeds of those "indictable" acts in an enterprise engaged in interstate or foreign commerce. But what did that adjective "indictable" tell the appellant? [24]

If Congress had meant to convey the thought that the appellant must have been in fact convicted or at least indicted on two or more charges under Section 2314, some other word than "indictable" would have been used. Then there would be some certainty in the statutory warning that would enable the appellant to assess the risk, before he made the type of investment outlawed by Section 1962(b), of investing the proceeds acquired from his prior criminal acts. But no such certainty was apparently intended, and none was established here by any prior indictment or conviction of the appellant under Section 2314.

Thus at the critical point preceding his investment in the St. Maarten hotel enterprise, appellant was warned only that if he made such an investment with the proceeds of two unexecuted but "indictable" acts, he might also be "indictable" under Section 1962(b). But "indictable" in whose eyes? The prosecutor might not deem appellant's contemplated actions "indictable" under Section 2314, or the grand jury might not consider the Section 2314 charges "indictable". Or, if indicted, tried and acquitted, would the appellant have truly committed "indictable" acts? Or what if the Section 2314 acts are committed but

24. "An indictment is a technical word peculiar to Anglo-Saxon jurisprudence, and implies the finding of a grand jury." *Grin v Shine*, 187 U.S. 181, 192 (1902). Thus the word "indictable" would seem to imply criminal activity warranting a finding or charge by the grand jury.

Black's Law Dictionary (4th ed. 1957) defines "indictable" as being "proper or necessary to be prosecuted by process of indictment."

simply never discovered or never prosecuted within the applicable limitations period? [25] The difficulty, in other words, is that Congress had conditioned its notice of what constitutes a Section 1962(b) violation upon the unproven possiblity that the individual may have committed two or more acts "indictable" under Section 2314, or some other specified federal statute. But until an indictment is actually returned, no one can say or predict that a particular act is "indictable." And until such an indictment is returned, the individual has no basis for assessing his options before making an investment that may involve criminality under Section 1962(b).

Thus to compel this appellant to guess, on pain of indictment under Section 1962(b), what a prosecutor, a grand jury and eventually a trial jury might do by way of indicting and convicting him on Section 2314 charges, "is to exact gifts that mankind does not possess." Holmes, J., in *International Harvester Co. v. Kentucky*, 234 U.S. 216, 224 (1914). That is the very essence of the vagueness condemned by the Fifth Amendment. See *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921).

The District Court sought to avoid the "vagueness" implications of the statutory reference to "indictable" acts by holding (32a) that, since the indictment charged violations of both Section 1962(b) and Section 2314, "[i]n order to convict the defendant on Count One, the Government will have to prove beyond a reasonable doubt all the material elements of two or more acts which are themselves violations of 18 U.S.C. Section 2314," which by itself "provides a sufficiently ascertainable standard of guilt." In short, the court dispensed with all constitutional requirements of a *prior* notice of what constitutes an

25. In its memorandum of law opposing the motion to dismiss Count One on vagueness grounds, the Government argued that "perhaps the word 'indictable' is used instead of the word 'criminal' in the statute because a pattern of racketeering activity can include conduct as to which criminal prosecution would otherwise be barred by the statute of limitations" (Memorandum, p. 3).

offense under Section 1962(b) by telescoping the trial of the two "indictable" Section 2314 acts with the trial of the Section 1962(b) charge. On that construction, Section 1962(b) was held (32a) "not unconstitutional for vagueness."

The court's resolution of the vagueness problem will not withstand constitutional analysis. If the Supreme Court's ruling in *Connally v. General Construction Co.*, 269 U.S. 385, 393 (1926), is to be respected, we must assume that the citizen is entitled to a precise statutory warning that makes it possible for him intelligently to choose, in advance, what course it is lawful for him to pursue. But if the citizen must await his Section 1962(b) trial to get the notice of what constitutes the "indictable" pre-conditions of the Section 1962(b) offense, then the constitutional concept of a fair and certain notice has been destroyed.

It may well be that Congress is constitutionally prohibited in this situation from consolidating the trials of three separate offenses, where the commission of two of those offenses is considered to be the essential predicate of the third offense. Thus where Crime 3 depends in critical part upon the established commission of Crimes 1 and 2, to force the defendant to defend himself simultaneously against all three alleged crimes is to eliminate the due process notice requirements as to Crime 3. Such a consolidation of charges and trials renders meaningless any requirement that the defendant have an option, after committing Crimes 1 and 2, of not committing Crime 3. He is not allowed to exercise that option with any certain knowledge that he has already committed Crimes 1 and 2. The very severity of such a result "lies in the absence of an opportunity either to avoid the consequences of the law or to defend any prosecution brought under it." *Lambert v. California*, 355 U.S. 225, 229 (1957).

In any event, The District Court's analysis of the problem finds no support in any authoritative declaration by the Supreme Court or by this Court. If there is vagueness adhering to a statutory criminal description, such vagueness has never been held curable by insisting that the "vague" crime be proved at trial beyond a reaonable doubt. Indeed, to permit a jury to find a defendant guilty of a vaguely defined crime, on proof that the jury and court believe to be beyond a reasonable doubt, is to offend the second basic value of the vagueness doctrine — i.e., preventing the delegation of the basic policy matters involved in a vague law "to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. at 109.

And so if the cross-reference in Section 1962(b) to "indictable" acts under Section 2314 be deemed vague and ill-defined at the point where the individual is entitled to an opportunity to avoid the evil consequences of a Section 1962(b) violation, such vagueness cannot be considered curable by the jury's subsequent verdict of guilt beyond a reasonable doubt. Proof beyond a reasonable doubt that an individual committed a Section 2314 violation cannot retroactively inject certainty into the previously-existing vague statutory reference to an "indictable" act under Section 2314. To repeat, vagueness must be assessed by the terms of the enactment, not by the vote of the jury or the quantum of proof. [26]

(2) *What is the "pattern of racketeering activity" proscribed by Section 1962(b)?* Still another vagueness

26. Query as to how, in a federal court trial for an alleged violation of Section 1962(b), proof beyond a reasonable doubt can be presented that the defendant committed, in the words of Section 1961(1)(A), "any act or threat involving . . .[specified types of crimes], which is chargeable under state law." The word "chargeable" would seem to bear the same brand of vagueness as the word "indictable," which is used only as to federal crimes. But it seems doubtful that a defendant under federal indictment could be charged and proved guilty of a "chargeable" state offense.

problem is raised by the language of Section 1962(b) referring to "a pattern of racketeering activity." Quite apart from the vagueness attached to the definition of "racketeering activity" as an "indictable" act, a constitutional due process problem is created out of the vague contours of the statutory concept of a "pattern" of racketeering activity.

For purposes of Section 1962(b), "a pattern of racketeering activity" is defined in Section 1961(5) as requiring "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years . . .after the commission of a prior act of racketeering activity." Thus, in terms of applicability to the instant case, Section 1962(b) outlaws any investment in an enterprise with the proceeds of at least two "indictable" acts in violation of Section 2314.

On the surface, this reference to two "indictable" acts in violation of Section 2314 seems clear enough, apart from the use of the vague word "indictable." But a person of ordinary intelligence, bent upon tracing all the cross-references incorporated into Section 1962(b), would discover that Section 2314 premises the illegality of interstate transportation of stolen property upon the existence of "any scheme or artifice to defraud."[27] The question would then be raised in that person's mind as to whether the requisite two "indictable" acts in violation of Section 2314 mean two schemes or artifices to defraud or two interstate transportations of stolen property in

27. The second paragraph of Section 2314, which is here relevant, imposes criminal penalties upon anyone who, "having devised or intending to devise any scheme or artifice to defraud . . .transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more."

execution of a single scheme or artifice to defraud.[28] Section 1962(b) and its manifold cross-references provide no easy answer to that problem. And as the indictment and charge to the jury in this case illustrate, if the answer is left to the prosecutor or the court the confusion and uncertainty surrounding the statutory cross-reference to *two* "indictable" acts in violation of Section 2314 can become exacerbated.

What considerations should occur to the person of ordinary intelligence who diligently seeks an answer to this problem so that he may exercise his option of not violating Section 1962(b) through the commission of *two* Section 2314 crimes? Among the considerations that he might discover are the following:

(1) Congress, in requiring that a "pattern" of racketeering activity consist of "at least two acts" of such activity, would appear to have intended that the two acts be entirely separate and unrelated. Obviously, the pattern could consist of two "indictable" acts under two separate statutes incorporated into Section 1962(b), or it could consist of two separate violations of the same incorporated statute. But as was stated by one of the House sponsors of the Organized Crime Control Act, Rep. Poff, the "pattern" of racketeering activity, in the Congressional lexicon, means "at least two independent offenses forming a pattern of conduct." 116 Cong. Rec., Part 26, p. 35193 (Oct. 6, 1970).

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28. Under the analagous mail fraud statute, 18 U.S.C. Section 1341, which is also listed in Section 1961(1)(b), courts have uniformly held "that each separate use of the mails in the execution of the scheme to defraud constitutes a separate offense." See, e.g., *Milam v. United States*, 322 F.2d 104, 109-110 (5th Cir. 1963). The same result has been reached as to separate wire transfers pursuant to a scheme to defraud by use of interstate wire facilities, 18 U.S.C. Section 1343. See *United States v. Freeling*, 31 F.R.D. 540, 549 (S.D.N.Y. 1962).

(2) Hence our man of ordinary intelligence might reasonably conclude that a "pattern" of racketeering activity is not established by two separate interstate transportations of stolen property in pursuance of a single scheme to defraud. He could conclude that Congress was concerned only with a "pattern" of truly separate and unrelated "indictable" acts, unconnected by a single scheme to defraud. And he would be bolstered in that conclusion by this Court's decision in *United States v. Blassingame*, 427 F.2d 329, 330 (2d Cir. 1970), holding under the wire fraud statute, 18 U.S.C. Section 1343, which is closely similar to Section 2314 in this respect, that the "essence of the crime is the fraudulent scheme itself" and that the "use of interstate communication is logically no part of the crime itself . . .[and] is included in the statute merely as a ground for federal jurisdiction."

If the *Blassingame* analysis be accepted, our man of ordinary intelligence would be fully justified in concluding that Congress, in referring to a "pattern" of two or more illegal acts, must have meant something more than a pattern of two or more federal jurisdictional acts.

In pinning the serious label of racketeer on an individual who has shown a proclivity or pattern of engaging in racketeering activities, Congress must have meant that the individual have done something more indicative of recidivism than to transport two separate checks across state lines in pursuance of a single, one-time scheme to defraud.

(3) Yet our man of ordinary intelligence, if he were capable of foreseeing what the prosecutor and judge did in the instant case, might be wary of concluding that a single scheme to defraud in violation of Section 2314 is insufficient to establish a "pattern". Here, both Count One of the indictment and the court's charge to the jury conceived of the separate Section 2314 transportations

pursuant to a single scheme as establishing a Section 1962(b) pattern. In light of the judicial precedents under similar statutes, [29] the view of the prosecutor and judge that each separate transportation of stolen property across state lines constitutes a separate Section 2314 offense cannot be dismissed as unreasonable. But that poses an insoluble dilemma for the individual earnestly trying to avoid a "pattern" of activity that would bring him into collision with Section 1962(b).

Which definition of a Section 2314 "pattern" is correct? How can he intelligently decide that problem from the vague description in Section 1961(5) of what constitutes a "pattern" of racketeering activity? What due process notice has Congress given as to the danger of committing multiple Section 2314 offenses pursuant to a single scheme to defraud?

The confusion as to the legislative meaning of a "pattern" of racketeering has been compounded in this case by the total subordination of both the Section 1962(b) investment and the Section 2314 transportations to the single scheme to defraud in alleged violation of Section 2314.

As is evident in paragraph 3 of Count One of the indictment (9a-13a), the so-called pattern of racketeering activity was conceived to consist primarily of a scheme to defraud Goberman of his hotel stock interest (10a), a scheme in which various incidents were deemed to constitute the requisite "pattern". And among those incidents described as "a further part of the above scheme to defraud" was the entire transaction by which Parness allegedly obtained a stock interest in the hotel in violation of Section 1962(b). See subparagraph (g) of paragraph 3 of Count One of the indictment (10a).

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29. See cases cited in footnote 28, *supra*. See also *Blockburger v. United States*, 284 U.S. 299, 302-303 (1932).

The court's charge to the jury made even more evident the complete subjugation of the Section 1962(b) charge to the alleged single scheme to defraud in violation of Section 2314. In complete disregard of the plain language of Section 1962(b), the jury was told that the "crucial" element of an offense under Section 1962(b) was the devising of a scheme to defraud (614a). And the second element was said to be "whether in carrying out that scheme, Mr. Parness engaged in a pattern of racketeering activity" (616a).

There was thus a complete statutory inversion. The single Section 2314 scheme to defraud became the dominant element around which whirled the Section 1962(b) pattern of racketeering activity and the Section 2314 acts of interstate transportation. Count One incorporated all charges under Section 2314 and Section 1962(b) under the umbrella of a single Section 2314 scheme to defraud. Counts Four, Five and Six, relating to specific incidents of transportation in violation of Section 2314, became surplusage; they were fully integrated into Count One, the "critical" element of which was said to be the Section 2314 scheme to defraud. [30] It is for that reason, it must be emphasized, that if Count One is found defective in any way, whether by reason of misconstruction of Section 1962(b) or by reason of vague provisions in Section 1962(b), Counts Four, Five and Six must also fall. The latter three counts have never had an independent life or meaning.

The vagueness and utter confusion that are involved in the attempt to coordinate a single Section 2314 scheme to defraud into the "pattern" of racketeering activity outlawed by Section 1962(b) are now evident. That

30. Thus, Count Four of the indictment (16a) is repeated and incorporated as subparagraph (i) of paragraph 3 of Count One (11a). Count Five (16a) is repeated and incorporated as subparagraph (h) of paragraph 3 of Count One (11a). And Count Six (16a-17a) is repeated and incorporated as subparagraph (j) of paragraph 3 of Count One (11a). Each of these three subparagraphs in Count One alleges that the described activity was in violation of Section 2314.

confusion has engendered a conversion of a Section 1962(b) offense into a single Section 2314 scheme to defraud, a scheme composed of a Section 1962(b) investment in a foreign hotel enterprise and three Section 2314 transportations in interstate commerce. In a real sense, the Section 1962(b) charge became the tail on the dog of the Section 2314 scheme to defraud.

The man of ordinary intelligence would stand aghast at the confusion created by leaving to the prosecutor and the court the task of applying the vague concept of a "pattern" of racketeering activity. By any conceivable standard under the Due Process Clause of the Fifth Amendment, the use of the phrase "pattern of racketeering activity" in Section 1962(b) must be deemed vague and uncertain. And Count One, as well as Counts Four, Five and Six, must necessarily fall.

POINT III

APPELLANTS WERE PREJUDICED WHEN THE PROSECUTION SWITCHED THE THEORY OF THE CRIME FOR THE FIRST TIME IN SUMMATION, AFTER RECOGNIZING THAT THE CHARGES IN THE INDICTMENT WERE NOT PROVEN.

A. The Prosecution Failed to Produce Substantial Evidence to Support The Conclusion of Appellants' Guilt Beyond a Reasonable Doubt of the Charges in the Indictment.

1. The Government's Total Failure of Proof

Appellants recognize that upon a challenge to the sufficiency of the Government's evidence, this Court must sustain the verdict of guilty if there is substantial evidence, taking the view most favorable to the Government, to support it. *United States v. Glasser*, 315 U.S. 60, 80 (1944). "Substantial evidence" in this context means evidence that a reasonably minded jury could accept as adequate and sufficient to support the conclusion of the appellants' guilt beyond a reasonable doubt.

In this case, we submit there was no evidence upon which the jury could have reasonably concluded (1) that any money was stolen from Hotel Corp., (2) that Parness stole or converted any money from Hotel Corp., and (3) that Barbara aided and abetted in the commission of any crime (Point IV, *infra*).

Unless there was substantial evidence that Parness stole or converted at least $160,000 of marker collections from Hotel Corp., appellants' convictions cannot stand. The indictment charges that Parness collected and then stole or converted $160,000 from marker collections belonging to Hotel Corp. and then, on February 4 and February 9, 1971, "loaned" Goberman these stolen or converted funds to pay off Holzer. If there was insufficient evidence that Parness stole or converted the $160,000 then no crimes were committed when the checks were transported from New Jersey to New York on February 4 and 9 and when Goberman travelled to New Jersey and back on February 4.

At no time during the trial did the prosecution reconstruct or demonstrate that any monies were collected and not transmitted by Parness. Neither Goberman nor any other witness provided proof that funds were kept by Parness which were due to Hotel Corp. (489a, 492a, 511a) Assuming, *arguendo*, that funds were stolen by Parness, the record is barren that those funds, in their entirety, made up the three checks obtained from Newark Bank. (47a, 47a-1) [31]

The prosecutor's statements to the jury on summation clearly acknowledge that the charges in the indictment were not proven:

> "Mr. Cohn said some things on his summation about the case resting on whether or not Parness or

31. Query: Can you convert money when you have given it back to the owner?

Olympic owed Goberman money. Wrong. *The question is whether or not Parness or Olympic [owed] the Hotel Corporation money, and the Hotel Corporation, it has been established, indisputably, owed Goberman money in turn.*

Thus, the government's case rests on the proposition that receipts of the hotel, receipts of the gambling casino, which Parness collected, were available to Goberman because he had advanced similar amounts of money to the Hotel Corporation at an earlier date (1647). (Emphasis supplied).

* * *

"Even after February, the early part of February 1971, Parness continued to collect gambling debts for the hotel *and the evidence is as clear as it can be that he continued to send money down to the hotel in the amounts of hundreds of thousands of dollars and that money too is money that should have been available to Allan Goberman." (1648-1649). (Emphasis supplied).*

* * *

"But the evidence showed that even though hundreds of thousands of dollars were collected by Parness and sent down to the hotel in the months of January, February, March, April 1971, Goberman wasn't able to get access to a nickel of it, and he testified here on the witness stand that when he arrived at the hotel during that period of time he found out that he couldn't even sign a check on the hotel's bank account" (1649). (Emphasis supplied.)

Goberman's failure to provide anything more than a guess as to how much he assumed was collected by Parness (489a-512a) when coupled with the prosecutor's admission

that from January to April 1971, Parness "sent down to the hotel" (1649) hundreds of thousands of dollars, mandates a finding that the charges in the indictment were not supported by any evidence.

There was, to repeat, a total lack of evidence that the appellants either stole or converted, or aided in stealing or converting, $160,000 or any other amount from the Hotel Corp. Thus here, as in *Garner v.Louisiana*, 368 U.S. 157, 163 (1961), "the convictions in these cases are so totally devoid of evidentiary support as to render them unconstitutional under the Due Process Clause. . . . " See also *Thompson v. City of Louisville*, 362 U.S. 199, 206 (1960); *Washington v. United States*, 357 U.S. 348 (1958).

2. The Erroneous Exclusion of the Markers

The slender thread, inadequate by itself, by which the Government attempted to keep its case together rested upon Goberman's testimony in which he assumed that Parness collected all the markers that he (Goberman) thought were outstanding (489a-512). The critical excerpt of Goberman's testimony is set forth at page 16, *supra.*

Unproved assumptions, of course, do not qualify as evidence, substantial or otherwise, from which a jury could properly conclude that Parness had stolen or converted any marker collections. And, if the jury's verdict was based on Goberman's assumptions, it cannot stand. But since those unproved assumptions were all that the Government brought to the jury in the way of proof that Parness stole or converted marker money, it became vitally necessary that the defense be allowed to rebut those assumptions and thus to insure that the jury would not accept the assumptions as circumstantial evidence of guilt. Since the jury apparently did accept those assumptions in returning its verdict of guilty, the prejudice to Parness in not being allowed to rebut and expose Goberman's assumptions becomes clear.

Parness, pursuant to Government subpoena, produced $155,000 in *original* markers (984) (Defendants' Exhibits Q-Y for identification). The witnesses, including Goberman, were unanimous in their testimony that when a marker is paid it is returned to the player (466, 984). Defense counsel offered to place the markers in evidence after their identification by Blandino (985, 998 *et seq.*). The trial judge refused the offer not withstanding his recognition that if the money was paid the player would have received his marker in return (999) and the Government's acknowledgment that the circumstantial inference to be drawn was that Parness had not collected the money represented by the markers (993). The trial judge apparently yielded to the prosecutor's "suspicion" that there could be "some phony markers" (993). Notwithstanding that the markers were the pivotal point in the case, the Court ruled they were irrelevant and incompetent (998), and did not leave even the "weight" to be given to them for the jury.

We submit that the markers should have been admitted into evidence with instructions that the weight to be given thereto be left to the jury (989). The jury could have reasonably concluded that the markers raised a reasonable doubt as to whether Parness collected those monies.

B. The Government's "New" Theory was Neither Charged in the Indictment Nor was it Based on Competent Evidence in the Record and Placing it Before the Jury was Prejudicial to Appellants.

1. The Prosecutor's Switch

The switch to the "new" theory during summation was sudden and shocking. The indictment and the entire trial were based on the theory that Parness had collected vast sums in marker money and *did not* transmit them to the hotel. However, the prosecutor, in his summation, conceded to the jury that from January through April 1971, Parness *did transmit* "hundreds of thousands of

dollars" to the hotel, but argued that Goberman was deprived of the use of the money (1648-1649).

We submit that there is no way that the new "transmittal-deprivation" theory can be read into the indictment. Further, there is no testimony that Parness stopped or prevented Goberman from exercising control over the hotel's funds or assets.[32] Finally, the "checking account" testimony was specifically ruled incompetent by the trial judge.

On direct examination Goberman was asked if and how he had lost control over the hotel's bank account (146a). The transcript reveals the following exchange: (146a-147a)

> "A. I didn't know I lost control of the bank accounts until I was told by Mr. MacDonald, the manager——
>
> MR. COHN: I object to what he was told by Mr. MacDonald.
>
> Q. Who is Mr. MacDonald?
>
> THE WITNESS: The manger of the Bank of Nova Scotia told me that I have no more rights in that bank.
>
> MR. COHN: Objection.
>
> THE COURT: I will allow that. *Not for the truth of the statement . . .*" (Emphasis supplied.)

Despite the Court's ruling, the prosecutor utilized the excluded inference from Goberman's testimony that he had somehow lost control of the bank accounts. In his summation to the jury, the prosecutor stated:

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32. Levrey testified that Goberman was taken off the account in May or June, 1971 (1443) — after the events set forth in the indictment.

> "But the evidence showed that even though hundreds of thousands of dollars were collected by Parness and sent down to the hotel in the months of January, February, March, April 1971, Goberman wasn't able to get access to a nickel of it. . ."(1649). (Emphasis supplied.)

If the jury chose the first alternative, i.e., collection-non remittal, we submit there is no evidence to support such a finding since the prosecutor conceded that the collections were transmitted. If the jury chose the "new" theory, i.e., remittance-deprivation, we submit that it was not charged in the indictment, it was not supported by competent evidence and is factually untrue (see, Point VI, *infra*).

2. The Court's Adoption of the Switch

The Court's charge reflected the Government's patent effort to change the entire theory of the crime:

> "First, and this is the crucial one [the Government must prove] that Mr. Parness devised a scheme or plan to defraud Mr. Goberman by *using monies* which Olympic or Parness obtained from the payment of markers, and so that they belonged to the hotel corporation; that they *used these monies to acquire* Mr. Goberman's interest in the stock of the Hotel Corporation (614a).
>
> As I understand it the Government is contending that Mr. Parness *collected* money due on the markers from the junketeers or the gamblers but *did not remit* these amounts to the hotel. *Or, if he did remit them, Mr. Goberman was denied their use*" (615). (Emphasis added.)

Paragraph 3 of Count One of the indictment contains 14 specifications of activity included in the alleged "pattern of racketeering activity." Nowhere in these specifications does the suggestion even appear that there

existed the "new" alternative theory articulated by the prosecutor in summation and the Court in its charge. There was never any allegation or proof that Parness stripped Goberman of his power over the funds or assets of the corporation.

Besides the fact that the Government's "new" contention is totally false, its eleventh-hour about-face on the theory of the case was a deliberate attempt to secure a conviction at any cost.

3. The Consequences of the Switch

Indeed, this obvious shift in the nature of the charges as submitted to the jury raises problems that are both constitutional and jurisdictional in nature. As the Supreme Court held in *Stirone v United States*, 361 U.S. 212 (1960), a federal trial court cannot, consistent with the Fifth Amendment, permit the admission of evidence or make a charge to the jury that incorporates any crime or element of a crime that has not been charged in the indictment.[33] To do so amounts to an amendment of the

33. In the *Stirone* case, the indictment had charged the defendant with having caused raw materials to move in interstate commerce into Pennsylvania. The trial court admitted evidence and charged the jury not only repeating the movement of the raw materials into Pennsylvania "but also in steel shipments [the finished products] from the steel plant in Pennsylvania into Michigan and Kentucky." 361 U.S. at 214.

The Supreme Court held that the trial court, by its admission of such evidence and by its charge to the jury, created not only a variance but an amendment of the indictment. Such a variance was held to have "destroyed the defendant's substantial right to be tried only on charges presented in the indictment returned by a grand jury." 361 U.S. at 217.

It is important to note that the trial judge in *Stirone*, like the trial judge in the instant case, projected the new theory in the charge to the jury as an alternative to the original theory expressed in the indictment. The jury was thus allowed to choose either theory of the crime.

indictment. See also *Ex parte Bain*, 121 U.S. 1 (1887); *Russell v. United States*, 369 U.S. 749, 770-771 (1962). And under the *Bain* ruling, once a trial court permits evidence or charges the jury respecting an altered charge, not made by the grand jury, that court loses jurisdiction to try a defendant on such an altered charge or to render any judgment in the matter.

Thus when the trial court in this case permitted the jury to consider the Government's new theory that if Parness did remit the money due on the markers "Mr. Goberman was denied their use" (615a), the trial court in effect was altering the indictment contrary to the constitutional dictates articulated in the *Stirone* decision. And the court, by that illegal act, lost jurisdiction to try Parness on the altered theory of the prosecution. Since it is possible that the jury did in fact convict Parness on this altered theory, the *Bain* ruling deprived the trial court of jurisdiction to enter a judgment of conviction against Parness.[34]

We do not and cannot know whether a grand jury would have indicted Parness on a charge that he in some way denied Goberman the use of the money collected on the markers. But we do know that what Chief Justice Marshall said in 1813 is still true, i.e., "that a man shall not be charged with one crime and convicted of another." *The Schooner Hoppet v. United States*, 7 Cranch 389, 394 (1813). As the Supreme Court reiterated much later in *De Jonge v. Oregon*, 299 U.S. 353, 362 (1937), "Conviction upon a charge not made would be sheer denial of due process." See also *Cole v. Arkansas*, 333 U.S. 196, 202 (1948).

For any and all of the foregoing considerations, the convictions below cannot stand, impregnated as they were with the altered charge never made by the grand jury.

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34. It is of course obvious that there is no evidence that Barbara aided and abetted Parness, in terms of the altered charge, in denying Goberman the use of the money collected on the markers.

POINT IV

THERE WAS NO EVIDENCE TO CONVICT BARBARA PARNESS ON AIDING AND ABETTING IN THE COMMISSIONS OF THE CRIMES CHARGED IN COUNTS FOUR, FIVE AND SIX.

The indictment charges that Barbara aided and abetted Parness in the commission of the crimes set forth in Counts Four, Five and Six. Counts Four and Six refer to the alleged interstate transportation, on February 4 and 9, 1971, of a total amount of $160,000. Count Five charges the interstate transportation of Goberman on February 4, 1971.

At the outset, it is obvious that if there be a complete absence of proof that appellant Parness stole or converted any marker money (see Point III, *supra*), Barbara's conviction as an aider and abettor in the commission of such an unproved offense cannot stand. One cannot aid and abet the commission of a crime never proved.

At the same time, the appellants have never contested the fact, and do concede for the purposes of this appeal, that on February 4, 1971, Barbara took a $56,000 check from Olympic and $99,000 in cash to the Newark Bank. Outside of Barbara acting as one of the two nominees for Milton, this was her only participation in the alleged transaction which gave rise to the indictment.

We respectfully submit that the proof as against Barbara, even apart from the basic insufficiency discussed in Point III, is legally insufficient to sustain any verdict that she aided and abetted the commission of the crime. There is no proof that on February 4, 1971, Barbara knew that she was transporting monies which had been stolen or converted. We recognize, of course, that this argument assumes that the money was, in fact, stolen or converted or taken by fraud by Milton. Even so, nothing in this

record can faintly suggest that Barbara had any knowledge of this.[35]

Furthermore, there was absolutely no testimony or proof that Barbara had knowledge of or participated in any way in Goberman's trip to New Jersey on February 4, 1971. Barbara never enters into the picture during any of the testimony surrounding the trip. Any conclusion that Barbara knew she was transporting stolen funds on February 4 or February 9, 1971, is entirely speculative and cannot provide a proper basis for a criminal conviction.

In order to aid and abet another to commit a crime it is necessary that a defendant associate himself with the venture, that he participate in something that he wishes to bring about, that he seek by his action to make it succeed. *Nye & Nissen v. United States*, 336 U.S. 613 (1949); *United States v. Peoni*, 100 F.2d 401 (2d Cir. 1938).

Here, there is no evidence of anything said or done by Barbara or in her presence before February 4, 1971, that associates her with a criminal design. Neither was the jury informed of anything said or done by Barbara after February 4 from which her earlier adherence to a scheme of wrongdoing could logically be inferred. *United States v. Barber*, 429 F.2d 1394 (3rd Cir. 1970).

Barbara's participation on and after February 4, 1971, was not needed to make any criminal venture succeed. Nor did she have sufficient ability, influence and control over the events and transactions to make it fail were she not involved. *United States v. Manna*, 353 F.2d 191 (2d Cir. 1965).

Barbara's conceded actions in serving as one of the nominees of the stock and as a courier in transporting

35. It is appropriate to recall the Supreme Court's statement in *United States v. Williams*, 341 U.S. 58, 64, fn. 4 (1951), that "To be present at a crime is not evidence of guilt as an aider or abettor."

unidentified cash to the bank, in the absence of any proof as to her knowledge that she was aiding in the commission of a scheme to defraud, can rise to no higher level than that of neutral activity. Her actions were as consistent with innocence as with guilt. And since guilt cannot rest upon an unproved possibility, the presumption of her innocence must prevail. The motion for judgment of acquittal should therefore have been granted.

POINT V

APPELLANTS WERE PREJUDICED BY THE PROSECUTOR'S IMPROPER REFERENCE TO THEIR FAILURE TO TAKE THE STAND AND THE INTERJECTION OF HIS PERSONAL BELIEFS AS TO THE APPELLANTS' GUILT.

The prosecutor, in summation, interjected his personal characterization of Parness by attributing to him a "cleverness that approaches the diabolic" (1649-1650). Further, he opined that "this case shows a pattern of fraud and chicanery which is practically beyond belief" (1651). He falsely stated, in referring to Mr. Parness' use of nominees, "Now, we have not had an explanation as to why that was done" (1653).[36]

In this setting we approach the prosecutor's abuse of appellants' right to remain silent and put on no defense when he, in discussing the $160,000 loaned to Goberman to pay off Holzer, stated:

> " . . .and common sense tells you that if Mr. Parness had borrowed $160,000 in February of 1971 the first witness that would have been on the stand for the defense would be the lenders, or somebody who could substantiate this borrowing story (1655).

* * *

36. Jeffrey Stone testified why it was done (1291-1292).

> And, ladies and gentlemen, I tell you *if Parness had produced a lender for that $160,000* on this witness stand, a bona fide lender who could show he put up the money, this case would be out the window and *you would be home weeks ago.* But that didn't happen" (1655). (Emphasis supplied.)

The unfairness implicit in that argument is obvious. It is nothing more than a stealthy comment on Parness' election not to take the stand and not to explain by his own testimony the source of the $160,000. If Parness was thus not obligated to testify that he borrowed the money, neither was he obligated to produce any lender from whom he might have borrowed the money. This was, in short, an oblique comment on Parness' failure to testify.[37]

The prosecutor's improper reference to the lack of a defense witness and to the fact that such witness would have enabled the jurors to have ended their service weeks earlier was compounded a few moments later with the prosecutor personally deriding the defense by characterizing it as "Phony, phony, phony. Shameful" (1656). (Only those of us unfortunate enough to hear the prosecutor's tone of voice and see the expression on his face can really comprehend the venom with which his statement was uttered to the jury!).

Building a crescendo of intensity, the prosecutor, pointing to appellants, stated:

> "...that the Parnesses, Mr. and Mrs., were trying desperately for quite a long period of time to find a cover story to hide the truth. *But they don't tell you exactly what the truth was*" (1659).

37. It is true that oblique comments on a defendant's failure to testify, if sufficiently suggestive, are as unlawful as direct comments." *United States v. Driscoll*, 454 F.2d 792, 800 (5th Cir. 1972), citing *Catlin v. United States*, 351 F.2d 618 (5th Cir. 1965), and *Benham v. United States*, 215 F.2d 472 (5th Cir. 1954).

Our law has always recognized a defendant's right not to put on a defense and not to take the stand. The prosecutor's intentional reference to the fact that the defense did not call a bona fide lender to the stand or that the Parnesses, both Mr. and Mrs., "don't tell *you* exactly what the truth was," when taken together with his other intemperate, false and ill-conceived remarks, mandates reversal of the convictions. We maintain that the language used by the prosecutor was manifestly intended and was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the defendants to testify. The prosecutor's conduct could have clearly swayed the jury against appellants. The jury obviously disbelieved Goberman on the key point that Parness used threats of violence towards him and the jury so told the court just before the verdict (1778-1779).

This Court recently recognized "the frequency with which allegations of prosecutorial misconduct have come before this court." The Court's comments were included in its opinion in *United States v. White*, (decided October 11, 1973), where the Court found that although the prosecutor's comments were intemperate and ill-conceived,[38] prejudice was minimal because "proof of guilt was clear and convincing."

The Court cited several "prosecutorial misconduct" cases it considered in the preceding six months. In *United States v. Drummond*, 481 F.2d 62 (July 1973), the Court reversed a narcotics conviction on the ground of repeated misbehavior of the prosecutor, including expressions of his personal opinions concerning the guilt of the defendant and the testimony of witnesses. The Court stated:

> "It is hardly necessary to cite authority to establish the impropriety of such conduct. See *United States*

38. The prosecutor charged twice that the defendant was "lying" and indicated that the defense was "fabricated."

> *v. Grunberger*, 431 F.2d 1062 (2d Cir. 1970); *Greenberg v. United States*, 280 F.2d 472 (1st Cir. 1960)." 481 F.2d at 64.

In *United States v. Miller*, 478 F.2d 1315 (May 1973), the Court recognized conduct by the prosecutor which was ill-conceived and "close to the line."

In *United States v. Fernandez*, 480 F.2d 726 (May 1973), the Court made note that the summation by the Assistant "surely went to the verge and perhaps beyond it."

In *United States v. Pfingst*, 477 F.2d 177 (April 1973), the prosecutor, in an excess of zeal, asked the defendant to produce a key document. The trial judge immediately admonished the prosecutor and thereafter advised the jury:

> "Ladies and gentlemen, it was improper for the Government attorney to make any such demand on the defendant, as I told you earlier, *not only for the reasons I indicated, that is that the defendant is not obligated to produce anything*, which I indicated at the outset of the case, *and no inference against a defendant may be drawn from the fact that he doesn't produce anything.* It is not his obligation (at p. 187)." (Emphasis supplied.)

On appeal this Court acknowledged that the Government conceded that the demand was erroneous for it "obviously violated the principle that the burden is on the Government to prove the defendant's guilt beyond a reasonable doubt; it also goes to the defendant's privilege against self-incrimination" (at p. 187-189).

This Court, in considering the question of whether the error was serious enough to require a new trial, stated:

> "...*In deciding this question we must consider, in the circumstances of this case, the degree of prejudice created in the minds of the jurors by the demand, the quality and forcefulness of the trial judge's corrective action and the strength of the Government's case. United States v. Semensohn*, 421 F.2d 1206, 1208-1209 (2d Cir. 1970)" (at p. 189). (Emphasis supplied.)

The Court affirmed the conviction, holding the prejudice minimal — "an isolated incident near the beginning of a long and complex trial" — as reinforced by the quantity and quality of the evidence against the defendant which he did not contest on appeal.

> "This is not a case where that evidence was of such questionable weight that doubt exists as to whether the case should have been submitted to the jury altogether. We thus do not fear that the prosecutor's improper conduct may have tipped the scales of justice against appellant" (at p. 189). (Emphasis supplied.)

In the case at bar, the prosecutor's improper conduct occurred during his summation and in a case where we urge that there exists no evidence or proof of guilt. This is not the typical case where the prosecutorial excesses can be overlooked in light of the overwhelming evidence of guilt. Where, as here, there was a total absence of substantial evidence to support the convictions, the prosecutorial misconduct may have so prejudiced the jury that it returned a verdict of guilt solely on the basis of the passions aroused by the prosecutor.

POINT VI

THE COURT BELOW ERRED IN DENYING APPELLANTS' MOTIONS FOR A NEW TRIAL BASED UPON NEWLY DISCOVERED EVIDENCE REBUTTING THE GOVERNMENT'S NEW, LAST-MINUTE THEORY OF THE OFFENSE.

Appellants twice moved for a new trial on the grounds that newly discovered evidence established that the Government's "new" theory of the offense first articulated in the summation and charge to the jury, was based upon fraudulent and false documentation and facts (652a, 691a).[39] Such evidence obviously did not become relevant at the trial until the new theory was announced; but by the time that theory was first announced in the Government's summation it was too late to present any rebuttal evidence. To submit the evidence that would factually disprove the new theory, therefore, the appellants could do so only by means of post-trial motions for a new trial. And the denial of those motions, so obviously inconsistent with the interests of justice, was plain error.

There is no question that in summation the prosecutor conceded that Parness did transmit "hundreds of thousands of dollars" to the hotel. The prosecutor urged, however, that Goberman — whom he argued was owed $150,000 by Hotel Corp. because he supposedly "loaned" the Holzer money to the corporation — was deprived of access and control over the funds which were assets of Hotel Corp. (1649).

We recognize that Goberman was cross-examined about what he did with Holzer's loan, but only for purposes of affecting his credibility. The subject first became substantively crucial when the "new" remittance-deprivation theory was articulated in the

39. The second motion for a new trial (691a) also sought, in the alternative, a hearing to determine whether the Government had suppressed evidence favorable to the appellants with respect to the new theory of the offense. See *Brady v. Maryland*, 373 U.S. 83 (1963).

prosecutor's summation, and the debtor-creditor relationship vis-a-vis Hotel Corp. and Goberman was set up as the foundation therefor.

Two elements became crucial by virtue of the shift in theory, i.e.,

1. Did Goberman advance the Holzer $150,000 to Hotel Corp. and was he, in fact, a creditor of Hotel Corp. for such amount?

2. Was Goberman deprived by Parness (or anyone else) of the control or use of Hotel Corp's funds and assets?

Subsequent to the trial, the defense dispatched a representative to the Bank of Nova Scotia in St. Maarten (696a). Bank records were obtained and information gathered which established:

1. Goberman did not loan the $150,000 to Hotel Corp.;

2. The $40,000 "check" included in Government Exhibit 23 is a fraud;

3. Goberman was not deprived of use and control of the funds and assets of Hotel Corp., and

4. The Government withheld exculpatory evidence.

All of such newly discovered evidence was submitted to the court below in support of the motions for a new trial. The relevance of such evidence in disproving the new theory of the offense that had been injected at the last minute of the trial is evident from the following considerations:

A. The Alleged Advance to the Hotel

The prosecution's opening statement clearly reflects the uncertainty as to what Goberman did with the $150,000 Holzer loaned him:

> "The $150,000 loan was acknowledged by everybody to be for the purpose *basically* of paying the hotel's current bills, and the proof will show that although the loan was made personally from Holzer to Goberman, *it was used — it was contributed*, if you will, *or loaned* by Goberman to the corporation which [owned] the hotel, in order to pay the bills" (pp. 7-8, minutes of proceedings September 12, 1973).

Goberman testified, on direct:

> "Q. What did you do with the $150,000 when you received it? A. It went into the general operation, I believe, of the hotel at that time" (94a).

Goberman also testified that the Holzer $150,000 check (GX19) was deposited to his personal account and that "subsequently the money was withdrawn from that account and I loaned it to the Hotel Corporation" (94a).

Goberman then identified Government Exhibit 23, which he said shows the transfer of money from his personal account to Hotel Corp.'s account (95a). GX22 is a copy of Goberman's personal account bank statement at the Bank of Nova Scotia for *October 1970 only* (708a).

Attached as Exhibit A to appellants' motion are photocopies of the St. Maarten Isle Hotel checking account statements for October through December 1970, which were obtained from the Bank of Nova Scotia (700a-704a).

We also obtained Goberman's personal account bank statements for November and December 1970 and January

1971 and those documents were attached to the motion as Exhibit B (709a-712a). These documents follow, in sequence, GX22 which is his October 1970 bank statement.

Exhibit 22 (708a) shows that on October 12, 1970, $150,000 was credited to Goberman's personal account. It also shows that a $50,000 check was paid on October 16. This apparently refers to the October 15, $50,000 check (No. A5778) reflected on GX23. The hotel account (700a) reflects that $50,000 was deposited on October 16.[40]

Exhibit B reflects a paid $40,000 check on November 18 (710a), a debit memorandum for $25,000 on December 1 (710a) and a debit memorandum for $20,000 on December 30 (712a). The aforesaid $40,000 check and two debit memoranda are supposedly reflected on GX23. The hotel bank account (Exhibit A) reflects the deposit of the two debit memoranda (702a, 704a).

But the $40,000 check — No. A5544, made payable to the hotel — *appearing on GX23, nowhere appears as a deposit in the hotel's account* (Exh. A, 700a-704a).

We submit further that out of $150,000 obtained by Goberman from Holzer, the hotel bank account reflects deposits of only $95,000 and the Government's representation to the jury that Hotel Corp. was indebted to Goberman for $150,000 was false.

Appellants maintained in their motions that the fact that $150,000 was not reflected on the hotel's bank statement as deposits could have made the difference in the verdict. The fact that the $40,000 check is not reflected therein could have had the same effect.

B. Goberman's Control of Assets and Funds

The second critical element that emerges as an issue because of the change in theory is the matter of

40. It should be noted that out of Holzer's $150,000, GX 22 (708a) also reflects a $2,000 check and a $25,000 check paid on October 16 and 20, respectively. However, no such sums appear as deposits in the hotel account for October.

Goberman's alleged lack of control over the corporation's assets and funds.

The truth is that Goberman was an authorized signatory on the hotel accounts for months after the dates set forth in the indictment. We obtained a copy of the hotel bank account signature card from the Bank of Nova Scotia which bears the names John Blandino, Edward Levrey and Allan Goberman and annexed it to the motion papers as Exhibit F (705a). The card reveals two account numbers and the fact that the names appeared thereon without deletion until the account was closed.

Furthermore, we learned that on April 5, 1971, Allan Goberman, as managing director of Hotel Corp., gave a third mortgage to the Windward Island Bank of St. Maarten in excess of $250,000, binding Hotel Corp. to cover notes issued May 15, 1970, and August 29, 1970. The notes were issued by Goberman to cover a huge overdraft of one of his wholly-owned corporations in St. Maarten.

We thus obtained from St. Maarten a certified copy of the mortgage deed dated April 5, 1971, which was recorded on the Island (Exhibit G to the motion papers) (716a-723a). In addition, we obtained a copy of a letter dated April 3, 1971, addressed to Mr. van de Voort, counsel for Windward Bank, confirming the agreement to give a third mortgage. The letter is signed by Allan Goberman as managing director of Hotel Corp. and was annexed to the motion as Exhibit H (724a).

Appellants raised the question that the Government was in possession of or had knowledge of the existence of the documents referred to above and was thus obliged under *Brady* to disgorge or disclose same to the defense. Appellants requested a hearing to inquire into the facts (658a, 660a-661a).

The Government responded that it was not in possession of the records "since the Bank of Nova Scotia had declined to make them available" (693a).

We then advised the Court that we had just learned that an attorney was present with an agent of the Government when the Bank of Nova Scotia made Hotel Corp. records available to the agent. Appellants requested a hearing (706a).

On December 7, 1973, upon argument of the motions, which the Court denied (p. 14, minutes of proceedings, December 7, 1973), the following occurred:

> "MR. ROSEN (for the appellants): Is your Honor going to grant [appellants] a hearing on [the question of the Government's knowledge of the bank records?]
>
> THE COURT: Well, I am going to proceed with the sentencing, and we will discuss it later. But I would like that on papers, particularly as to what [Milton Schwartz — the attorney] is going to say" (p. 15, minutes of December 7, 1973).

Appellants then filed additional papers with the District Court, including an affidavit from Milton Schwartz which stated clearly that he was with Agent Glaze in St. Maarten, prior to trial, when Hotel Corp.'s bank records were shown to Agent Glaze (697a-699a).

The court denied the motions for a new trial and did not even direct a hearing (6a). Such denial closed the last possibility appellants had to escape from the clutches of the last-minute switch in the theory of the offense. The "sheer denial of due process" involved in the conviction of the appellants for an offense not charged in the indictment, *De Jonge v. Oregon*, 299 U.S. 353, 362 (1937), was perpetuated and finalized by the denial of the new trial motions.

CONCLUSION

There are multiple reasons why these convictions must be reversed and the indictment dismissed. All of those reasons cut deeply into the mainstream of the Due Process Clause of the Fifth Amendment and the appellants' rights thereunder.

There is one final consideration, however, that overlays all the constitutional, statutory and legal arguments herein presented. In adopting the Organized Crime Control Act of 1970, Congress had in mind outlawing the evil activities of organized groups or mobs of criminals, described as "a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct." See Section 1 of Public Law 91-452 (set forth as a note to 18 U.S.C.A. Section 1961).

But Congress did not have in mind imposing the threat of this Act's 20-year prison sentence, one of the highest prison sanctions in the entire United States Code, upon a small individual entrepreneur entirely divorced from the organized criminal activity of this nation. At worst, he became enmeshed in a questionable financial transaction that happened to involve the interstate transit of three cashier's checks. To spell out from that small one-time transaction the statutory elements of a bigtime racketeer engaging in a vicious pattern of racketeering activities is to abuse the principles of statutory construction and to do violence to the expressed will of Congress.

The time to stop this dangerous extension of the Organized Crime Control Act into the questionable activities of the individual citizen unconnected with "organized crime" is now. The reversal of the judgments

below must serve as a warning and reminder to the Government that this extraordinary statute must be confined to the extraordinary situations that Congress had in mind.

Respectfully submitted,

ROY M. COHN
Attorney for Appellants

Eugene Gressman
Michael Rosen
Of Counsel